**Knowing is Half the Battle: The Case for Investigative Subpoena Power in the Military Justice System**

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*[T]here are known knowns: There are things we know we know. We also know there are known unknowns: That is to say we know there are some things we do not know. But there are also unknown unknowns–the ones we don't know we don't know.*[1]

## I. Introduction

You are the trial counsel for a Marine helicopter squadron. As you peruse the police blotter after a long weekend, you hear a knock at your door. A Naval Criminal Investigative Service (NCIS) agent informs you that he is opening a proactive investigation into a possible drug ring involving multiple Marines. The evidence implicating the Marines consists of the word of one Sailor who, after testing positive for cocaine, provided NCIS with a list of "bigger fish" on base. The Sailor also has a recent nonjudicial punishment for fraud and lying to superiors. The agent wants to obtain a search warrant for the Marines' off-base residences, and tells you the squadron commander wants to apprehend and charge the Marines as soon as possible. "All of this requires probable cause," you explain to the agent, "and we have none." The agent suggests that you should issue subpoenas for the Marines' telephone and bank records, "just like the U.S. Attorney's Office does." You remind him that military prosecutors have no subpoena power until charges are referred[2] or an Article 32, Uniform Code of Military Justice (UCMJ) preliminary hearing is ordered.[3] Just then, your phone rings. It is the squadron commander, wanting to know what your plan is to deal with the suspected drug dealers who are currently turning wrenches on his aircraft.

For federal prosecutors, investigative subpoenas[4] (in the form of grand jury subpoenas) are an indispensible tool for gathering key evidence early in the life of a criminal investigation.[5] Unfortunately, no similar tool is currently available to military trial counsel. The result is frustrating and paradoxical. Evidence requiring a subpoena remains essentially off-limits to military investigators and trial counsel until after the initial investigation is complete and charges have been filed. As a consequence, trial counsel are forced to charge and go to trial with the evidence they have, not the evidence that is out there.[6]

Concern over these impediments and their impact on military criminal investigations resulted in several calls to expand military subpoena power.[7] In response, Congress recently changed Article 47 to allow issuing *subpoenas duces tecum* at Article 32 preliminary hearings.[8] While this is an improvement, military subpoena power remains ineffective to

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[1] DONALD RUMSFELD, KNOWN AND UNKNOWN: A MEMOIR xiii (2011).

[2] Referral is an order directing that charges against an accused be tried by a specific court-martial, but first these charges must be "preferred," or sworn, against an accused. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 307 (2012) [hereinafter MCM] (discussing preferral); *see also id.* R.C.M. 601(a) (discussing referral).

[3] *See* MCM, *supra* note 2, R.C.M. 703(e)(2)(C); 2014 Amendments to the Manual for Courts-Martial, Exec. Order No. 13,669, 75 Fed. Reg. 34,999, 35,003 (June 18, 2014) (amending R.C.M. 703(e)(2)(C) to allow the issuance of *subpoena duces tecum* by an Article 32 investigating officer or by trial counsel after referral of charges); National Defense Authorization Act for Fiscal Year 2014, Pub. L. 133-66, 127 Stat. 672, 954 (2013) [hereinafter NDAA FY 2014] (amending Article 32 by replacing the terms "pretrial investigation" and "investigating officer" with "preliminary hearing" and "preliminary hearing officer").

[4] For the purposes of this article, the term "subpoena" refers to a subpoena to produce documents or similar evidence (*subpoena duces tecum*), not a subpoena to compel testimony. Similarly, the term "investigative subpoena" refers to a *subpoena duces tecum* that is used in the investigation of a suspected criminal offense prior to the initiation of charges. "*Duces tecum*" is a Latin phrase that means "bring with you." BLACK'S LAW DICTIONARY 538 (8th ed. 2004).

[5] E-mail from Mark Pletcher, Assistant U.S. Att'y, S. Dist. of Cal., to author (Mar. 11, 2015) (on file with the author) [hereinafter Pletcher E-mail]. Mr. Pletcher stated that the grand jury (with its attendant powers) is the single most important tool federal prosecutors use in complex investigations. *Id.* Federal prosecutors routinely use grand jury subpoenas to obtain documentary evidence (including bank records, telephone records, and email subscriber information), evaluate it (both to inculpate and exculpate), and understand the nature of the crimes being investigated. *Id.*

[6] *See* Major Joseph B. Topinka, *Expanding Subpoena Power in the Military*, ARMY LAW., Sept. 2003, at 21 (describing how the lack of "critical subpoena authority during the principal and formative parts of investigations" results in "impediments to timeliness, evidence gathering, case integrity, and case perfection"); OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF DEF., CRIMINAL INVESTIGATIVE POLICY & OVERSIGHT, EVALUATION OF SUFFICIENCY OF SUBPOENA AUTHORITY WITHIN THE DEPARTMENT OF DEFENSE IN SUPPORT OF GENERAL CRIMES INVESTIGATIONS 4, 10 (May 15, 2001) [hereinafter CIPO STUDY].

[7] *See* discussion *infra* Parts II.B.1–3.

[8] *See* UCMJ art. 47 (2012); *see also supra* note 3 and accompanying text.

acquire evidence when it is needed most: during the initial investigation and before the initiation of charges. To remedy this, Congress should amend the UCMJ to provide investigative subpoena power prior to the preferral of charges.

This article will propose changes to the UCMJ and Rules for Courts-Martial (RCM) that would expand military subpoena power and conform it more closely to federal criminal procedure. Part II explores military subpoena power in its current form and surveys the various proposals to expand it. Part III discusses the problems created by current military subpoena power and the lack of viable alternatives to subpoena evidence prior to preferral. Part IV examines subpoena power in the federal criminal justice system as a model for expanded military subpoena power, and discusses the changes required to implement it. The appendices contain proposed language which, if enacted, would create investigative subpoena power in the military justice system and enable more timely, thorough, and just investigations and prosecutions.

## II. Subpoena Power in the Military Justice System

### A. Articles 46 thru 48 and RCM 703

The power of compulsory process in the military justice system is found in Articles 46 thru 48. Article 46 provides that trial counsel, defense counsel, and the court-martial "shall have equal opportunity to obtain witnesses and other evidence . . . ."[9] Notably, it also requires that process "issued in court-martial cases to . . . compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue . . . ."[10] Articles 47 and 48 outline the enforcement mechanisms by which a military court can compel the production of subpoenaed evidence and punish noncompliance.[11]

Rule for Courts-Martial 703(e)(2) contains the President's implementation of Articles 46 thru 48 in the form of procedures for issuing and enforcing subpoenas.[12] Historically, RCM 703(e)(2)(C) provided that a subpoena to obtain evidence could only be issued by trial counsel "of a special or general court-martial."[13] Thus, the authority of a trial counsel to issue a subpoena did not vest until after charges had been referred by the convening authority to a specific court-martial. Though recent changes to Article 47 and RCM 703 grant trial counsel the ability to issue subpoenas for an Article 32 preliminary hearing, subpoena power remains unavailable during the formative stages of a military investigation.[14]

### B. Proposals to Expand Military Subpoena Power

Neither the restrictive nature of military subpoena power nor its impact on the efficiency of military criminal investigations are new controversies to the military justice system. On the contrary, Congress and the executive branch have ordered several studies into the limitations of military subpoena power resulting in numerous calls for a change to the status quo.

#### *1. National Academy of Public Administration (NAPA) Report*

In 1999, Congress directed the National Academy of Public Administration (NAPA)[15] to assess military criminal investigative organization (MCIO) investigations of sexual misconduct.[16] Among other findings, the NAPA report highlighted the lack of MCIO access to investigative subpoena power and resulting negative impact on investigating military sex crimes.[17] The NAPA report observed a "growing potential for use of subpoenas in investigations involving Internet computer crime, including pornography and child solicitation," and recommended that

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[9] *See* UCMJ art. 46 (2012).

[10] *See id.*; *cf.* UCMJ art. 36 (2012) (stating pretrial procedures shall "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" to the extent the President "considers practicable").

[11] *See* UCMJ arts. 47-48 (2012). For a primer on military subpoena enforcement mechanisms, see Major Brett Miner, A Military Practitioner's Guide to the Compulsory Process (Subpoenas and Warrants of Attachment) of Civilian Persons, Civilian Businesses, and Non-Military Governmental Agencies (May 16, 2015) (unpublished primer, The Judge Advocate General's Legal Center and School) (draft on file with author).

[12] *See* MCM, *supra* note 2, R.C.M. 703(e)(2)(c); 2014 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,669, 75 Fed. Reg. 34,999, 35,003 (June 18, 2014); *see also* Major Chris W. Pehrson, *The Subpoena Duces Tecum and the Article 32 Investigation: A Military Practitioner's Guide to Navigating the Uncharted Waters of Pre-Referral Compulsory Process*, ARMY LAW., Feb. 2014, at 10.

[13] *See* UCMJ art. 27 (2002); Topinka, *supra* note 6, at 21 ("There is no trial counsel or court-martial within the meaning of Rule for Courts-Martial 703(e)(2)(C) until a convening authority has referred a case to trial and counsel is detailed to the court-martial. By implication, there is no trial counsel subpoena authority in a military case until after referral of the charges.").

[14] *See supra* notes 2-3 and accompanying text.

[15] The National Academy of Public Administration (NAPA) is an independent, congressionally chartered organization comprised of former legislators, jurists, government executives and scholars and tasked with assisting Government agencies and organizations in research and problem solving. *See* Pub. L. No. 98-257, 98 Stat. 127 (1984); *see also* CIPO STUDY, *supra* note 6, at 1. In this regard, NAPA's composition and mandate closely resemble recently created organizations tasked with studying the efficacy of the military justice system, such as the Military Justice Review Group, Judicial Proceedings Panel, and Response Systems to Adult Sexual Assault Crimes Panel. *See* discussion *infra* Part II.B.4.

[16] *See* NAT. ACAD. OF PUB. ADMIN., ADAPTING MILITARY SEX CRIME INVESTIGATIONS TO CHANGING TIMES 4-5 (June 1999) [hereinafter NAPA REPORT].

[17] *See id.*; CIPO STUDY, *supra* note 6, at 1.

the military services be provided with subpoena approval authority.[18]

*2. DOD IG Criminal Investigative Policy & Oversight (CIPO) Study*

Following the NAPA report, in 2001, the Office of the Department of Defense (DoD) Deputy Assistant Inspector General (IG) for Criminal Investigative Policy and Oversight (CIPO) conducted a study to determine whether the limitations on military subpoena power adversely impacted the military services' ability to conduct general crimes investigations.[19] As part of the study, CIPO surveyed 2,023 MCIO investigators and 753 judge advocates with current or prior military justice experience.[20] From the survey responses, the study concluded that existing military subpoena authority was inadequate to compel the production of evidence in general crimes investigations.[21] Specifically, the report identified "a significant number of situations in which a certain mechanism [to subpoena evidence] was needed but was not available."[22] The CIPO study concluded that "as a result of this lack of a fully effective mechanism to compel production of evidence, some investigations are incomplete, and some prosecutions may be precluded."[23] The DoD General Counsel and military services' judge advocate leadership concurred with CIPO's findings and conclusion, and forwarded the matter to the Joint Services Committee (JSC) on Military Justice for further action.[24]

*3. DOD Office of Legislative Counsel (OLC) Legislative Proposal*

In 2011, the JSC persuaded the DoD Office of Legislative Counsel (OLC) to propose an amendment to the UCMJ that would allow issuing subpoenas prior to the referral of charges.[25] The OLC legislative proposal highlighted the problems caused by the absence of pre-referral subpoena power: "In many cases involving telephone, Internet Service Provider, bank records, and similar records. . . [the] investigation is often delayed or obstructed."[26] The OLC proposal also emphasized the requirement of Article 36 for "military practice . . . to conform to Federal criminal procedure" to the extent practicable, before contrasting military subpoena power with federal practice where "prosecutors and grand juries have subpoena powers even before charges are filed."[27] While the "DoD's legislative proposal envisioned expanding 10 U.S.C. § 847 [Article 47] to provide broad authority to issue *subpoenas duces tecum* after preferral of charges . . . Congress ultimately opted for a more subdued version of the amendment" which limits the expansion of subpoena power to Article 32 investigations.[28] This compromise was borne of concern "over how recipients could challenge a pre-referral subpoena . . . where the convening authority would have cognizance over the case and the power to quash or modify the subpoena."[29]

*4. Response Systems to Adult Sexual Assault Crimes Panel (RSP) Report*

Despite Congress' effort in 2012 to provide limited expansion of military subpoena power, recent scrutiny of military sexual assault investigations once again brought the issue of the adequacy of military subpoena power to the fore. The 2013 National Defense Authorization Act (NDAA) directed the Secretary of Defense (SECDEF) to establish the Response Systems to Adult Sexual Assault Crimes Panel (RSP) to review and assess "the systems used to investigate, prosecute, and adjudicate" military sex assault crimes and develop recommendations for improving their effectiveness.[30] The SECDEF also established the Comparative Systems Subcommittee (CSS) to "compare the investigation, prosecution, defense, and adjudication of sexual assault cases in the military and civilian systems" and make appropriate recommendations to the RSP.[31] The CSS

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[18] *See* NAPA REPORT, *supra* note 16, at 8; CIPO STUDY, *supra* note 6, at 9.

[19] *See* CIPO STUDY, *supra* note 6, at i. The CIPO defined "general crimes" as felony-type offenses under the UCMJ punishable by a dishonorable discharge and one year or more years of confinement, not including fraud crimes or purely military offenses (e.g. drug and sexual assault offenses). *See id.*

[20] *See id.* at 5-9.

[21] *See id.* at 3; *see also* Pehrson, *supra* note 12, at 9.

[22] *See* CIPO STUDY, *supra* note 6, at i.

[23] *See id.* at ii.

[24] *See id.* at 10-11, 15-24; *see also* Pehrson, *supra* note 12, at 9. ("[T]he JSC is responsible for reviewing [the MCM] and proposing amendments to it and, as necessary, to [the UCMJ]."). *See* U.S. DEP'T OF DEF., DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE para. 3 (3 May 2003); Pehrson, *supra* note 12, at 9 n.14.

[25] *See* OFFICE OF LEGISLATIVE COUNSEL, U.S. DEP'T OF DEF., SIXTH PACKAGE OF LEGISLATIVE PROPOSALS SENT TO CONGRESS FOR FISCAL YEAR 2012 § 532 (2011) [hereinafter OLC LEG. PROPOSAL], http://www.dod/gov/dodgc/olc/docs/15April2011LP.pdf; ANNUAL REPORT SUBMITTED TO COMMITTEE ON ARMED SERVICES OF THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES AND TO THE SECRETARY OF DEFENSE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 2010 TO SEPTEMBER 30, 2011 § 1 (2011), http://www.armfor.uscourts.gov/newcaaf/annual/FY11AnnualReport.pdf (summarizing testimony of Colonel Charles Pede, U.S. Army, Exec. Sec. of the JSC); Pehrson, *supra* note 12, at 9.

[26] *See* OLC LEG. PROPOSAL, *supra* note 25, § 532, at 2.

[27] *See id.*

[28] *See* Pehrson, *supra* note 12, at 10.

[29] *See id.*

[30] *See* BARBARA S. JONES ET. AL., REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 1 (2014).

[31] *See* ELIZABETH L. HILLMAN ET. AL., REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL

was specifically tasked with identifying "best practices from civilian jurisdictions that may be incorporated into any phase of the military system," and recommending numerous systemic changes to the military justice system as a result.[32] These recommendations included expanding the military judge's role in the pretrial process to begin at preferral or the imposition of pretrial confinement.[33] To this end, the CSS recommended authorizing "the military judge to issue subpoenas to secure witnesses, documents, evidence, or other assistance . . . with *ex parte* procedures as appropriate that will allow the defense the opportunity to subpoena witnesses through the military judge."[34]

## III. Problems with Military Subpoena Power and the Lack of Viable Alternatives

### A. Difficulties Caused by Current Military Subpoena Power

While the recent changes to military subpoena power were intended to "increase the availability of documentary evidence during the criminal investigation and [Article 32] investigation stages of a case," the formative stages of a criminal investigation do not occur during the Article 32 preliminary hearing, but prior to the preferral of charges.[35] The absence of investigative subpoena power during this period creates numerous problems impacting the efficient administration of justice.[36]

#### *1. Blind Spots in Investigation and Charging Decision*

Several critical steps in the investigation and charging process occur before the Article 32 preliminary hearing, any of which could be substantially impacted by the discovery of subpoenaed evidence. Upon suspicion that a UCMJ violation has been committed, an investigative entity (e.g. an MCIO, IG, or the accused's command) is tasked with gathering relevant evidence in order to determine the nature and scope of the misconduct, identifies suspects, and gathers relevant evidence.[37] Based on this investigation, the suspect's commander, in his role as the court-martial convening authority, decides on an appropriate course of action, and if the convening authority determines that the offenses should be adjudicated at a court-martial, the investigation is typically presented to trial counsel for charges to be preferred.[38] At no point up to this stage in the process does an investigative entity have the power to issue subpoenas. Yet evidence that can only be obtained by subpoena is critical to the successful development and outcome of many investigations. This is especially true in complex investigations (e.g. fraud or conspiracy) and proactive investigations (e.g. investigations into drug distribution networks) where telephone and financial records are frequently used.[39]

The absence of investigative subpoena power increases the potential for blind spots in investigations. For example, evidence of suspicious financial transactions or phone calls may cause investigators to pursue new leads that uncover a suspect's involvement in a larger (or different) criminal enterprise with more serious charges. Without this information, these leads may be missed altogether. Conversely, subpoenaed records may help investigators refute an uncorroborated allegation, confirm an alibi, or close an investigation as unfounded, conserving scarce resources that would otherwise be wasted on a case that should never have proceeded to trial. Furthermore, subpoenaed evidence is frequently used to develop probable cause necessary to utilize other more robust investigative tools, such as search warrants[40] and specialized court orders.[41] These investigative

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ASSAULT CRIMES PANEL 2 (2014) [hereinafter CSS REPORT]. The Comparative Systems Subcommittee was comprised of "four members of the [Response System Panel (RSP)] as well as six experts with extensive knowledge of military or civilian criminal justice," with "more than 188 years of military service and 326 years of criminal justice experience . . . supported by a staff with current knowledge of military justice and experience in investigation, training, prosecution, and defense." *Id.* at 1.

[32] *See id.* at 2.

[33] *See id.* at 8, 28, 181.

[34] *See id.* at 30, 185-86.

[35] *See* OLC LEG. PROPOSAL, *supra* note 25, § 532, at 2.

[36] *See* Topinka, *supra* note 6, at 21.

[37] *See* MCM, *supra* note 2, R.C.M. 303.

[38] *See id.* R.C.M. 307 and discussion. In many investigations, military commanders or law enforcement agencies will consult with trial counsel early in the investigation process, before a decision on adjudication is made. *See, e.g.*, UNDERSEC'Y OF DEF. FOR PERSONNEL AND READINESS, ESTABLISHMENT OF SPECIAL VICTIM CAPABILITIES WITHIN THE MILITARY DEP'TS TO RESPOND TO ALLEGATIONS OF CERTAIN SPECIAL VICTIM OFFENSES, 2 (2013) ("For the initial investigative response, the [Military Criminal Investigative Organization] will notify the [Special Victim Capabilities] legal representative within twenty-four hours of determining that an allegation meets the criteria of a special victim offense.").

[39] *See* CIPO STUDY, *supra* note 6, at 6; Pletcher E-Mail, *supra* note 5.

[40] *See* FED. R. CRIM. P. 16(c); Pletcher E-mail, *supra* note 5. There is also a fair amount of confusion regarding the differences between subpoenas and search warrants.

> A subpoena is generally considered less intrusive than a warrant. The warrant authorizes an officer to enter, search for and seize, forcibly if necessary at a reasonable time of the officer's choosing, that property to which the officer understands the warrant refers; the *subpoena duces tecum* instructs the individual to gather up the items described at his relative convenience and bring them before the tribunal at some designated time in the future. The validity of a warrant may only be contested after the fact; a motion to quash a subpoena can ordinarily be filed and heard before compliance is required.

CHARLES DOLE, CONG. RESEARCH SERV., RL33321, ADMINISTRATIVE SUBPOENAS IN CRIMINAL INVESTIGATIONS: A BRIEF LEGAL ANALYSIS 12 (2006) [hereinafter CRS REPORT].

[41] Examples include court orders to obtain historical cell site information pursuant to 18 U.S.C. § 2703(d) and orders to compel Internal Revenue

tools can help determine the location of a suspect's cell phone on a given date and time, uncover evidence of fraud based on a suspect's tax filings, and discover evidence of a crime in the suspect's possession or effects. The inability to subpoena evidence early in the investigation diminishes an investigator's ability to obtain and utilize these valuable tools.

The absence of pre-preferral subpoena power also makes it difficult for trial counsel to investigate, identify, and prefer accurate charges during the early stages of his involvement in a criminal case. It is ultimately the trial counsel's responsibility to analyze the available evidence, identify legally appropriate charges, and ensure those charges can be proven at trial. To aid in this responsibility, trial counsel often conduct additional investigation to confirm the viability of charges under consideration, close evidentiary gaps, and evaluate other possible charging strategies. Once satisfied, trial counsel draft the charges and specifications and prefer them against the accused. However, lack of subpoena power during the charging process often results in trial counsel being forced to charge imprecisely and instead substitute "unknown" for dates, locations, co-conspirators, quantities, dollar amounts, and values.[42]

*2. Effect on timing and outcome of plea negotiations*

The lack of investigative subpoena power can also impair plea negotiations and timely disposition of cases. Staff Judge Advocates (SJAs) and convening authorities often set deadlines to submit proposed pretrial agreements in order for them to be given favorable consideration. This usually coincides with early trial milestones such as prior to initiating an Article 32 pretrial investigation or referral to special court-martial. Late submissions by the defense are rejected outright or accepted with an increase in the accused's punitive exposure, in order to minimize delay, conserve prosecution resources, and promote judicial economy.[43] Meanwhile, the defense's evaluation of plea offers is typically based on the strength of the government's evidence and the government's concessions in exchange for a guilty plea; if the former is lacking, the latter must increase (and vice versa). Because knowledge drives negotiations, gaps in the government's evidence for want of timely subpoena power can mean the difference between a quick plea and a contested trial. Investigative subpoena power would give both sides a better sense of the state of the evidence facilitating more informed plea negotiations and earlier plea offers.

*3. Effect of delays on speedy trial*

The current timing of subpoena power coupled with delays in compliance by subpoena recipients can complicate government efforts to mitigate speedy trial concerns.[44] Rule for Courts-Martial 707's 120-day speedy trial clock is of vital concern to the government after the preferral of charges.[45] This concern is magnified in cases involving an accused who is in pretrial confinement where Article 10 requires the government to exercise "reasonable diligence" in taking the accused to trial.[46] For example, if critical evidence is not received by the conclusion of the Article 32 preliminary hearing, should the government request that the hearing be kept open? Should the government request that delay be excluded from speedy trial computations?[47] If so, how is this delay accounted for on the speedy trial clock? Does it matter who requested the subpoenaed evidence?[48] While there has been no case law on the speedy trial consequences of subpoena-related delay on an Article 32 preliminary hearing, previous case law suggests that it will be difficult for the government to justify requests for excludable delay caused solely by a subpoena recipient's delays in compliance.[49]

*4. Impact of newly discovered evidence on judicial economy*

While speedy trial concerns require diligence by the government in moving a case to trial, haste can also create serious problems if new evidence requires additional charges or major changes to the charge sheet. Late-subpoenaed evidence may lead to new charges which require the Article

Service disclosure of confidential tax information pursuant to 18 U.S.C. § 6103(i).

[42] *See* MCM, *supra* note 2, R.C.M. 307 discussion. Precise charging is even more critical in light of the U.S. Supreme Court's recent holding that "[f]acts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." Alleyne v. United States, 133 S. Ct. 2151, 2152 (2013).

[43] This assertion is based on the author's professional experiences as Defense Counsel assigned to Marine Corps Air Ground Combat Center from 2008–2009 and Trial Counsel assigned to Marine Corps Air Station Miramar from 2010–2012.

[44] Depending on the size of the business or entity being subpoenaed, the scope of the subpoena's request, and requests or litigation to modify or quash the subpoena, the timeframe for compliance can range from anywhere from days to months. Based on the author's recent professional experience as Special Assistant U.S. Attorney, Southern District of California, the average timeframe for subpoena compliance is usually between fifteen to forty-five days.

[45] *See* MCM, *supra* note 2, R.C.M. 707.

[46] *See* UCMJ art. 10 (2012); Pehrson, *supra* note 12, at 19 n.140; United States v. Thompson, 68 M.J. 308, 312 (C.A.A.F. 2010) (requiring "immediate steps" be taken to bring an accused who is in pretrial confinement to trial).

[47] *See* MCM, *supra* note 2, R.C.M. 707(c)(1) and discussion.

[48] At an Article 32 preliminary hearing, it may be possible for the trial counsel, defense counsel, and preliminary hearing officer to each seek the issuance of subpoenas. *See* Manual for Courts-Martial; Proposed Amendments, 79 Fed. Reg. 59,938, 59,941 (proposed Oct. 3, 2014).

[49] *See* U.S. v. Byard, 29 M.J. 803 (A.C.M.R. 1989) (finding that fifty-eight days of delay while pending receipt of subpoenaed financial records was chargeable to the government where trial counsel did not first exhaust subpoena alternatives). "*Byard* exemplifies the difficulty of trying to subpoena records quickly and efficiently before trial." Topinka, *supra* note 6, at 24-25.

32 preliminary hearing to be re-opened.[50] If charges have been forwarded and SJA's advice provided to the general court-martial convening authority, new evidence or charges would also require these procedural steps to be repeated as well.[51] A worst-case scenario occurs if late-subpoenaed evidence requires additional charges or major changes to the charge sheet after arraignment, neither of which can happen without the accused's consent.[52] The likely outcome of this scenario is two separate courts-martial for the same underlying conduct.

For these reasons, military investigative subpoena power is essential to ensure a thorough investigation prior to initiating charges and to improve the efficiency of the military justice process.

B. Problems with Subpoena Alternatives

There are several alternatives to traditional subpoenas that may allow the government to obtain documentary evidence earlier in a military investigation. Unfortunately, these alternatives are limited in scope and practicality of use.

One alternative is the administrative subpoena. "Administrative subpoena authority is the power vested in various administrative agencies to compel testimony or the production of documents or both in aid of the agencies' performance of their duties."[53] Administrative subpoenas are "not a traditional tool of criminal law investigation, but neither are they unknown."[54] Several statutes authorize the use of administrative subpoenas in conjunction with criminal investigations, one of which is the Inspector General Act of 1978.[55] This statute confers the DoD Inspector General (IG) with administrative subpoena power to obtain a wide variety of documentary evidence "necessary in the performance of the [IG] functions assigned."[56] As a result, the DoD IG subpoena is "limited in scope, because its focus is fulfilling the [DoD] IG's functions . . . relating to the detection, prevention, and investigation of fraud, waste, and abuse" in DoD "programs and operations . . . ."[57] So, while DoD IG subpoenas may be available in certain fraud cases where the DoD is the victim,[58] they "are of little use to most investigations of general crimes specified in the UCMJ."[59] Furthermore, even in investigations for which DoD IG subpoenas are permissible, the procedural requirements necessary to obtain one are notoriously "lengthy, cumbersome, and difficult to handle."[60] Finally, while some[61] have proposed making DoD IG subpoenas more accessible by delegating IG subpoena authority to a lower level (e.g. designated officials within each service), no provision in the Inspector General Act permits delegation "outside the Office of the Inspector General or [use] for purposes outside the scope of the Act."[62]

Another alternative is RCM 703(e)(2)(C) which allows subpoenas to be issued by "an officer detailed to take a deposition."[63] However, a deposition may only be ordered by the convening authority prior to the referral of charges and upon a showing that "due to exceptional circumstances, it is in the interest of justice that the testimony of the prospective witness be taken and preserved for use at [an Article 32] preliminary hearing or a court-martial."[64] The military deposition's limited application[65] makes it unavailable for use as a tool to subpoena documentary evidence in most cases.[66] Finally, similar to the rules for obtaining administrative subpoenas, the rules governing military depositions "are procedurally complex,"[67] further limiting the deposition's utility as a means for issuing subpoenas.

While administrative subpoenas and depositions can serve as a potential workaround to the current limitations on military subpoena power, their inherent complexities and restrictions make them of no value in a majority of military criminal investigations. Creating investigative subpoena power would eliminate the need for such workarounds while harmonizing the UCMJ with federal practice.

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[50] *See* UCMJ art. 32 (2012); National Defense Authorization Act for Fiscal Year 2014, Pub. L. 133-66, 127 Stat. 672, 954 (2013) ("No charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing.").

[51] *See* UCMJ arts. 33-34 (2012).

[52] *See* MCM, *supra* note 2, R.C.M. 601(e)(2), 603.

[53] CRS REPORT, *supra* note 40, at 1.

[54] *Id.*

[55] *See* 5 U.S.C. app. § 6(a)(4).

[56] *See id.*

[57] *See* Topinka, *supra* note 6, at 22 n. 93; CIPO STUDY, *supra* note 6, at 4.

[58] *See* CIPO STUDY, *supra* note 6, at 1 (During a three-year period, 95% of DoD IG subpoena requests were in support of fraud investigations.).

[59] *Id.* at 4.

[60] *See* Topinka, *supra* note 6, at 22.

[61] *See id.* at 9.

[62] CIPO STUDY, *supra* note 6, at 9.

[63] MCM, *supra* note 2, R.C.M. 703(e)(2)(C).

[64] *See* UCMJ art. 49 (2012); Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 532 (2014).

[65] As a practical matter, the deposition's purpose of preserving testimony for trial makes it generally inapplicable to corporate custodians of records or compliance officers, who simply maintain the business records being sought.

[66] *See* Topinka, *supra* note 6, at 21.

[67] FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 11-60.00 (3d ed. 2013) [hereinafter COURT-MARTIAL PROCEDURE].

## IV. Proposal: Federal Subpoena Power as a Model for Military Subpoena Power

Article 36 requires military practice to conform to Federal criminal procedure to the extent practicable.[68] Yet "[f]ederal prosecutors and grand juries have subpoena powers even before charges are filed"—a power that remains unavailable in military practice.[69] In an era where military crimes are becoming increasingly complex and efforts to reform the military justice system are ubiquitous, conforming military subpoena power to federal practice is an uncontroversial way to increase the effectiveness of military investigations.

### A. Subpoena Power in the Federal Criminal Justice System

Federal Rule of Criminal Procedure 17(c) governs the issuance of *subpoenas duces tecum*, generally, and states,

> A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence.[70]

Under federal criminal procedure, there are two types of subpoenas: trial subpoenas and grand jury subpoenas.[71] A trial subpoena may be issued for the purpose of securing evidence to prepare for trial.[72] A trial subpoena is "not intended to provide a means of discovery for criminal cases."[73] However, either party may use a trial subpoena to "obtain evidence that either party knows about, and to obtain it before the trial begins."[74] The party seeking to use a trial subpoena must demonstrate:

> (1) that the documents [sought] are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."[75]

In contrast, "[a] grand jury subpoena is . . . much different from a [trial subpoena], where a specific offense has been identified and a particular defendant charged."[76] "The purpose of a federal grand jury subpoena is to obtain evidence for presentation to a grand jury that may show that a person has committed a federal crime."[77] Though the grand jury's function is limited toward the possible return of an indictment,[78] "given a proper purpose . . . grand jury subpoenas can cast a wide net."[79] Federal criminal procedure permits prosecutors to "obtain a blank subpoena from the clerk of court and use it to order the production of any books, papers, documents, data or other objects designated by the prosecutor" before charges are even filed.[80] The Supreme Court explains,

> The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.[81]

### B. Similarities Between Grand Jury and Military Investigations

Though there are no grand juries in the military,[82] the purpose of a grand jury investigation is fundamentally no different from the purpose of a military criminal investigation: to gather all evidence necessary to determine whether or not a person has committed a crime and present

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[68] UCMJ art. 36 (2012).

[69] *See* OLC LEG. PROPOSAL, *supra* note 25, § 532, at 2.

[70] FED. R. CRIM. P. 17(c); *cf.* MCM, *supra* note 2, R.C.M. 703(e)(2)(b) ("A subpoena may also command the person to whom it is directed to produce books, papers, documents or other objects designated therein at the proceeding or at an earlier time for inspection by the parties.").

[71] FED. GRAND JURY PRACTICE, OFFICE OF LEGAL EDUC., U.S. DEP'T OF JUSTICE 5 (2008) [hereinafter GRAND JURY MANUAL].

[72] *Id*. at 5.39.

[73] *Id.*; United States v. Nixon, 418 U.S. 683, 698 (1974) (citing Bowman Dairy Co. v. United States, 341 U.S. 214, 220 (1951)).

[74] *See* GRAND JURY MANUAL, *supra* note 71, at 5.39.

[75] *See Nixon*, 418 U.S. at 699-700.

[76] United States v. R. Enterprises, Inc., 498 U.S. 292, 297 (1991).

[77] GRAND JURY MANUAL, *supra* note 71, at 5.1.

[78] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-11.120 (1999), http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

[79] GRAND JURY MANUAL, *supra* note 71, at 5.1.

[80] *See* FED. R. CRIM. P. 17(a); OLC LEG. PROPOSAL, *supra* note 25, § 532, at 2.

[81] *R. Enterprises, Inc.*, 498 U.S. at 297 (internal quotations and citations omitted).

[82] *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .").

that evidence to an authority vested with the power to charge.[83]

In the federal criminal justice system, evidence collected during an investigation is presented to the grand jury, which is constitutionally "charged with the responsibility of determining whether or not a crime has been committed"[84] and is "empowered to indict and to refuse to indict."[85] "To make that decision, the grand jury must determine whether there is probable cause . . . to believe that a crime has been committed, and if the individual charged in the indictment committed it."[86] As the Supreme Court has stated, because the grand jury's "task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad."[87] These broad powers include the ability to compel the production of evidence prior to the initiation of charges.[88]

In the military justice system, convening authorities exercise many quasi–judicial functions that resemble the powers of the grand jury.[89] Like the grand jury, convening authorities are uniquely empowered to direct charges or refuse to charge.[90] Subpoenaed evidence assists convening authorities in exercising this responsibility. One distinction between the grand jury and convening authority is that "the grand jury is regarded primarily as a protection for the individual," [91] "a kind of buffer or referee between the government and the people."[92] The convening authority has no similar function, but is instead charged with maintaining good order and discipline within his command.[93] In practice, however, "the grand jury's role [in routine investigations] is only accusatory, not investigatory."[94] Instead, investigators gather evidence using the grand jury's subpoena power, but not necessarily with their foreknowledge or approval.[95] The prosecutor then presents the evidence to the grand jury, often through the summarized testimony of a single law enforcement agent.[96] Similarly, a convening authority often decides whether or not to charge a suspect based on a summary of the evidence obtained by investigators. Investigative subpoena power would increase the convening authority's situational awareness at this decisional stage, further protecting servicemembers from the risk of unfounded charges.

### C. Changes Necessary to Expand Military Subpoena Power

#### *1. Judicial Oversight*

As part of its broader proposal to increase the pretrial involvement of military judges in the military justice process, the CSS recommended that military judges serve as the subpoena issuing authority.[97] However, the federal district court's oversight of the grand jury subpoena process offers a better model for military judge involvement in issuing subpoenas. To carry out its investigative and accusatory functions, the grand jury relies on the district court's subpoena and enforcement powers under the Federal Rules of Criminal Procedure.[98] However, neither the grand jury nor the prosecutor must request or obtain the court's approval before issuing a grand jury subpoena.[99] Instead, on motion by a subpoenaed party, the district court may quash or modify a subpoena that is unreasonable, oppressive, or violates the law.[100]

Giving military judges a similar role in the subpoena process would offer several advantages over the CSS proposal. It would provide a check on the government's use

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[83] *See* MCM, *supra* note 2, R.C.M. 303.

[84] *R. Enterprises, Inc.*, 498 U.S. at 297.

[85] CRS REPORT, *supra* note 40, at 11.

[86] GRAND JURY MANUAL, *supra* note 71, at 2.1.

[87] Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

[88] *See supra* note 77.

[89] *See* United States v. Nealy, 71 M.J. 73, 78 (C.A.A.F. 2012) (Baker, C.J., concurring) ("[T]he convening authority plays a central role as both quasi-judicial decision maker and as commander, the custodian of good order and discipline.").

[90] *See* MCM, *supra* note 2, R.C.M. 306, 401. It is worth noting that the Article 32 investigation (now preliminary hearing) has been frequently and improperly analogized to the grand jury. There are significant differences between a grand jury's plenary power to investigate and dispose of a case and the Article 32 preliminary hearing's limited, non-binding authority to determine if probable cause exists and make recommendations on the disposition of a case. *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. 133-66, 127 Stat. 672, 954 (2013) (explaining the limited purpose of an Article 32 preliminary hearing).

[91] GRAND JURY MANUAL, *supra* note 69, at 2.2.

[92] United States v. Williams, 504 U.S. 36, 47 (1992).

[93] *See* COURT-MARTIAL PROCEDURE, *supra* note 66, at § 11-20.00.

[94] GRAND JURY MANUAL, *supra* note 69, at 2.1.

[95] *See* Lopez v. Department of Justice, 393 F.3d 1345, 1349 (D.C. Cir. 2005) ("[T]he term 'grand jury subpoena' is in some respects a misnomer, because the grand jury itself does not decide whether to issue the subpoena; the prosecuting attorney does."); *see also* 1 SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:2, at 6-12 (rev. 2d ed. 2001) ("[T]he federal courts have universally rejected the claim that the [federal] prosecutor must secure the prior authorization of the grand jury before he can issue a subpoena.").

[96] *See* GRAND JURY MANUAL, *supra* note 69, at 7.1.

[97] *See* CSS REPORT, *supra* note 31, at 186.

[98] *See* CRS REPORT, *supra* note 40, at 11-12 (noting that, though the grand jury itself "belongs to no branch of the institutional government[,] . . . [t]he subpoena power upon which the grand jury relies . . . is the process of the court and may be enforced only through the good offices of the court."); *see also* FED. R. CRIM. P. 17.

[99] Prior court approval for grand jury subpoenas is unnecessary because "the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." Blair v. United States, 250 U.S. 273, 282 (1919).

[100] *See* FED. R. CRIM. P. 17(c)(2).

of investigative subpoena power without overburdening the judiciary with routine requests for commonly subpoenaed evidence.[101] It would provide an improved means of redress for those seeking relief from compliance with unreasonable or oppressive subpoenas prior to referral.[102] Finally, it would allay earlier congressional concerns with proposals to extend subpoena prior to the Article 32 stage.[103]

The CSS proposal for earlier military judge involvement would also improve defense access to compulsory process.[104] Unlike many civilian public defenders, military defense counsel lack independent subpoena power.[105] Instead, the defense must submit its requests for compulsory process to the convening authority, via trial counsel, for review and approval.[106] This forces defense counsel to prematurely disclose confidential aspects of defense case theory and strategy to trial counsel and leads to a perception that military compulsory process is "imbalanced in favor of the government."[107] The CSS proposal would remedy this by giving the defense "access to *ex parte* procedures . . . [such as issuing a] subpoena [to] witnesses through the military judge[] without disclosing information to the trial counsel or convening authority . . . ."[108] In addition to providing the defense with equal access to evidence via compulsory process, this would promote judicial economy by reducing the amount of pretrial litigation over defense discovery requests.

However, the scope and timing of subpoena power must logically differ depending on which party is seeking to utilize it. Unlike trial counsel—whose investigative subpoena power is used to investigate and charge suspected offenses—defense counsel's need to subpoena evidence does not arise until preferral, when "a specific offense has been identified and a particular defendant charged."[109] For this reason, a defense subpoena is necessarily a trial subpoena and should require a higher threshold showing for issuance.[110] While these distinctions may seem to resemble the same "imbalance" the proposed changes were intended to correct, they offer improved subpoena access to both parties that is commensurate with their intended uses.

*2. Changes to UCMJ and RCM*

Enhanced subpoena power would necessarily require changes to several provisions of the UCMJ and the *Manual for Courts-Martial (MCM).*[111] Article 47 would need to be amended to allow for the issuance of *subpoenas duces tecum* prior to the Article 32 preliminary investigation for a military criminal investigation. Rule for Courts-Martial 703 would require several changes: (1) adding "designated military judge" to the list of who may issue subpoenas, (2) adding instructions for the defense use of compulsory process, (3) deleting references to the Article 32 pretrial investigation and referral as prerequisites for investigative subpoena power, and (4) deleting language granting the convening authority the ability to quash or modify an unreasonable or oppressive subpoena.

## V. Conclusion: Military Investigative Subpoena Power is Long Overdue

In an era of increased congressional focus on the perceived shortcomings of the military justice system, Congress can and should amend the UCMJ to provide investigative subpoena power to aid military investigations and prosecutions. Yet despite Article 36's requirements of conformity to federal practice, numerous calls to expand military subpoena power, and the utility of investigative subpoenas to federal prosecutors, subpoena power remains unavailable to military investigators and prosecutors prior to the charging decision. This can create a ripple effect that impacts every aspect of the investigation and court-martial process.

While there are several potential alternatives to subpoena evidence earlier in the military justice process, each has significant restrictions. Department of Defense IG subpoenas are limited in scope and must serve the IG purpose of combating fraud-related crimes where the DoD is the victim.[112] Depositions, while providing the deposition officer with subpoena power, do not generally apply to routine *subpoenas duces tecum* issued to corporate custodians.[113]

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[101] *See* CSS REPORT, *supra* note 31, at 186 n.847.

[102] *See* MCM, *supra* note 2, R.C.M. 703(f)(4)(C) ("If the person having custody of evidence requests relief on grounds that compliance with the subpoena or order of production is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena or order of production be withdrawn or modified.").

[103] *See* OLC LEG. PROPOSAL, *supra* note 25, § 532, at 2.

[104] *See* CSS REPORT, *supra* note 31, at 28-29.

[105] *See id.* at 30.

[106] *See id.* at 33; MCM *supra* note 2, R.C.M. 703(f)(3).

[107] *See* CSS REPORT, *supra* note 31, at 29.

[108] *See id.* at 30.

[109] *See* United States v. R. Enterprises, Inc., 498 U.S. 292, 297 (1991).

[110] *Compare* United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004) ("The Government is obligated to produce by compulsory process evidence requested by the defense that is 'relevant and necessary.'"), *with* United States v. Nixon, 418 U.S. 683, 699–700 (1974) ("[I]n order to require production prior to trial, the moving party must show . . . that the documents are evidentiary and relevant . . . ."). Because a post-arraignment subpoena by trial counsel is also necessarily used in preparation for trial, issuance should also be restricted to the military judge and conditioned on a demonstration of relevance and necessity by trial counsel.

[111] *See infra* App. A-B.

[112] *See* Topinka, *supra* note 6, at 22 n. 93; CIPO STUDY, *supra* note 6, at 4.

[113] *See* Topinka, *supra* note 6, at 21.

Current proposals to expand subpoena power by increasing the military judge's role in the pretrial process are promising but go too far by requiring military judge approval for all subpoena requests.[114] This level of judicial involvement is unnecessary for military subpoena power that is modeled after federal grand jury subpoena power—where courts have oversight but intervene only as circumstances require. Such a model would improve both sides' access to evidence at all stages of the military justice process and provide subpoena recipients with an improved means of redress before a military judge. Accomplishing this would require changes to the UCMJ and MCM. However, these changes are long overdue in light of Article 36's mandate and the many problems caused by current limitations on military subpoena power.

[114] *See supra* Part B.

(a) Any person not subject to this chapter who—

(1) has been duly subpoenaed to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board, or has been duly issued a *subpoena duces tecum* ~~for a preliminary hearing pursuant to section 832 of this title (article 32);~~ for a military criminal investigation;

(2) has been provided a means for reimbursement from the Government for fees and mileage at the rates allowed to witnesses attending the courts of the United States or, in the case of extraordinary hardship, is advanced such fees and mileage; and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce; is guilty of an offense against the United States.

(e)(2)(C) *Who may issue.*

(1) A subpoena to secure evidence may be issued by:

(a) The summary court-martial;

(b) At any time prior to arraignment, detailed trial counsel supporting a military criminal investigation; ~~At an Article 32 hearing, detailed counsel for the government;~~

(c) After preferral of charges, a designated military judge upon application by detailed defense counsel; ~~After referral to a court-martial, detailed trail counsel;~~

(d) After arraignment, a designated military judge upon application by detailed trial counsel or detailed defense counsel;

~~(d)~~(e) The president of a court of inquiry; or

~~(e)~~(f) An officer detailed to take a deposition.

(f)(4)(B) *Evidence not under the control of the government.* Evidence not under the control of the government may be obtained by a subpoena issued in accordance with subsection (e)(2) of this rule. A *subpoena duces tecum* to produce books, papers, documents, data, or other objects or electronically stored information ~~for a preliminary hearing pursuant to Article 32~~ may be issued, ~~following the convening authority's order directing such preliminary hearing~~ by counsel for the government or a designated military judge, in accordance with subsection (e)(2)(C) of this rule. A person in receipt of a *subpoena duces tecum* for an Article 32 hearing need not personally appear in order to comply with the subpoena.

(f)(4)(C) *Relief.* If the person having custody of evidence requests relief on grounds that compliance with the subpoena or order of production is unreasonable or oppressive, ~~the convening authority or, after referral, the,~~ a designated military judge may direct that the subpoena or order of production be withdrawn or modified.